Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al,
Respondents

AMICUS CURIAE BRIEF OF INTERNATIONAL ASSOCIATION OF NVOCCS IN SUPPORT OF PETITIONER

RAYMOND P. DE MEMBER
Attorney for International Association of NVOCCS
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

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TABLE OF CONTENTS

	Page
Question Presented	1
Interest of the Association	1
Decision Below	4
Conex Decision	5
Analysis of the Work in Controversy By the Court Below	8
Right of Control Issue	11
Proper Standard of Review	13
Conclusion	14

TABLE OF CASES

COURT CASES:

American Trucking v. *Atchison T and S-F RR Co.*, 387 U.S. 397 (166)	12
Balicer v. *ILA*, 364 F.Supp. 205, (D.C.N.J. 1973)	7
Balicer v. *ILA*, 86 LRRM 2559, (D.C. N.J. 1974)	7
Beth Israel Hospital v. *NLRB*, 437 U.S. 483	13
ICC v. *Delaware L & W RR*, 220 U.S. 233, (1911)	12
ILA v. *NLRB*, 537 F. 2d 706 (2d Cir. 1976), *cert. den.* 429 U.S. 1041 *rehear den.* 430 U.S. 911 (1977)	5, 7, 9
ILA v. *NLRB*, 460 F. 2d 439 (1st Cir. 1977)	5
ILWU—California Cartage Co., 515 F. 2d 1018 (D.C. Cir. 1975) enforcing 208 NLRB 994 (1974), *cert. den.* 424 U.S. 942 (1976)	5

Page

Humphrey v. *ILA*, 548 F. 2d 494 (4th Cir. 1977) 5

National Woodworking Mfrs. Ass'n v. *NLRB*, 386 U.S. 612 (1967) 4, 13

NLRB v. *Enterprise Association of Pipefitters, etc.*, 429 U.S. 507 (1977) 11, 13, 14

NLRB v. *Ironworks*, 434 U.S. 335 13

NLRB v. *Weingarten*, 420 U.S. 251 13

AGENCY CASES:

Acme Fast Freight Inc. Common Carrier Appl., 17 MCC 549 (1939) 11

Agreement 10294—Cancellation of Consolidation Allowances To Off Pier NVOCC Consolidators, FMC Docket 77-23 (I.D. Dec. 1979). 19SRR 1113 3

ILA and Consolidated Express 221, NLRB 957 (1975) 7, 9

ILA, NYSA and Dolphin Forwarding et al, 236 NLRB No. 42 (1978) 5, 6

Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders, 6 FMC 327 (1961) 7

Possible Violations of Shipping Act 16 SRR 425 (1975) 12

Sea-Land Services Inc. and GPRL—Proposed Rules on Containers, etc., FMC Dockets 73-17, 74-40, 18 SRR 553 (FMC 1978) adopting I.D. 16 SRR 315 (1975) 12

Ulmann v. *Porto Rican Express*, 3 FMB 771 (1952) .. 2

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QUESTION PRESENTED

Whether the Court below correctly denied enforcement of the decision of the NLRB that Respondents violated Section 8(b)(4) and 8(e) of the National Labor Relations Act by agreeing to and implementing the so-called Rules on Containers that sought to acquire the long established work of off-pier consolidators.

INTEREST OF THE ASSOCIATION

The International Association of Non-Vessel Operating Common Carriers (hereinafter the "Associa-

tion") is a trade association whose members are freight consolidating non-vessel operating common carriers ("NVOCCs") in ocean transportation, regulated by the Federal Maritime Commission (FMC) under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended (46 USC 801 *et seq.*). The NVOCCs, like Dolphin Forwarding, Inc. and San Juan Freight Forwarders in this case, receive from their customers shipments known in the trade as "less than container load" (LCL) or "less than trailer load" (LTL) shipments which they consolidate into large containers for transportation to ocean-going vessels. Functioning as independent carriers, NVOCCs provide the public with freight transportation, a portion of which moves over water, and assume responsibility for such transportation, although they do not own or control the vessels. *Ulmann* v. *Porto Rican Express,* 3 FMB 771 (1952). There are approximately 400 NVOCCs having tariffs on file at the FMC.

The Association's interest in this case is apparent and vital—the very existence of many NVOCC operations are at stake. Indeed, under the guise of the "work preservation" of the so-called Rules on Containers, Respondents International Longshoremen's Association (ILA), New York Shipping Association (NYSA) and Council of North Atlantic Shipping Association (Conasa) seek to eliminate the many NVOCC freight consolidators who operate within a 50-mile radius of the ports—a radius that includes a large majority of NVOCC operations. In question here is whether Respondents may use the Rules on Containers to eliminate NVOCCs whose employees are not represented by ILA and force their work to the piers to be acquired by ILA represented companies.

NVOCCs perform an essential and valuable service to the public. By coordinating, assembling and consolidating shipments in sealed containers for the LCL or LTL shipper,[1] the NVOCC reduces loss and damage, pilferage, as well as congestion and delay at the piers.[2] By also preparing the documentation, routing and tracing shipments and performing transfer services, the NVOCC in effect becomes the export marketing and traffic management arm of the LCL or LTL shipper. These functions make it possible for many shippers to participate in the export trade of the United States on a competitive "delivered price" basis overseas. In these circumstances, the extinction[3] of the NVOCCs located within 50 miles of the port imposes obvious injury to the companies involved, contravenes the public interest, and serves only the

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[1] "Shipper" is used only to describe those who seek the services of carriers to transport the "shipper's" cargo—the term "shipper" is not used to describe the vessel operator or ocean line carrier.

[2] In a recent FMC decision, it was found that the off pier consolidation of LCL cargo reduces pilferage and damage to cargo and that a prime impetus for the development of containerization was reduction of damage and pilferage and the ability of containership operators to load full containers on their ships rapidly. *Agreement 10294—Cancellation of Consolidation Allowances To Off-Pier NVOCC Consolidators,* FMC Docket 77-23, Initial Decision (Dec. 13, 1979). 19 SRR 1113, 1136 and 1148. (Presently on Exceptions before the FMC.)

[3] Extinction is the manifest result of the decision below. Under the Rules on Containers, the NVOCCs are boycotted from receiving the containers for stuffing and stripping. Without containers, the operations must cease. Moreover, under the Rules on Containers, affected NVOCC's could not even *relocate* outside the 50 mile radius in order to continue operations. See Appendix A of the decision below. Section II Rules on Containers, C. Rules on No Avoidance or Evasion.

purposes of Respondents to acquire the work of NVOCCs.[4]

DECISION BELOW

Contrary to the uniform position of three other circuits, the court below failed to find substantial evidence for the NLRB's conclusion that the Rules on Containers violated Section 8(b)(4) and 8(e) of the Act. Instead, the court adopted a "tunnel vision" method for analyzing a work preservation issue. It emphasized almost exclusively the history of longshoremen and excluded the parallel work traditions of off pier consolidators. Since ILA had done some stuffing and stripping of containers, the Rules on Containers were considered work preservation. The court ruled that the NLRB had impermissibly focused on the work done by the off pier consolidators rather than rely just on the work performed by longshoremen.

The court's position lacks a logical or legal basis. In *National Woodwork Manufacturers Ass'n* v. *NLRB, supra,* the test for considering work preservation issues included an inquiry into all the "surrounding circumstances." The circumstances necessarily include the nature of the work which the subject bargaining unit is purporting to preserve for itself and the economic effect of the boycott on other employers and employees in the industry. The existence of an independent and parallel competing labor tradition, which tradition stands to be destroyed by the boycott activity,

[4] The economic impact on the NVOCCs as well as the public interest served by these organizations are factors appropriately considered as "the surrounding circumstances" under the National Woodwork tests. *National Woodworking Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612 (1967).

has an obvious impact on the determination of whether a bargaining unit is pursuing illegal work acquisition.

To examine only the work done by the longshoremen, as suggested by the court below, and to conclude that they may acquire work similar to that which they perform on the docks, is to ignore the long standing work tradition of off-pier workers. The Board properly considered the parellel off pier work traditions. In short, it was the court below, and not the Board, that misapplied the applicable legal standards.

CONEX DECISION

All parties agree that the decision below directly conflicts with the decisions in three other circuits.[5] Of particular importance are the *Conex* proceedings leading up to *ILA* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976) *cert. denied* 429 U.S. 1041 (rehearing denied 430 U.S. 911 (1977)). The decision of the NLRB here, denied enforcement by the court below, specifically relied upon the *Conex* precedent. Indeed, the Board stated that the decision in *Conex* was "controlling."[6] As noted by the Board, the "*Conex* case involved the identical Respondents and dealt with the same Rules

[5] *ILA* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. den.* 429 U.S. 1041, *rehear. den.* 430 U.S. 911 (1977); *ILA* v. *NLRB,* 460 F.2d 439 (1st Cir. 1977); *Humphrey* v. *ILA,* 548 F.2d 494 (4th Cir. 1977). The decision below also is contrary to the NLRB decision on container rules in *ILWU California Cartage Co.,* 208 NLRB 994 (1974) which was enforced by the U.S. Court of Appeals for D.C., 515 F.2d 1018 (1975) (Mem. Op.) *cert. den.* 424 U.S. 942 (1976).

[6] *ILA, NYSA and Dolphin et al.,* 236 NLRB No. 42 (1978) Mem. Op. p.5.

on Containers." *Supra,* note 6, Mem. Op. p.5. The charging parties in *Conex* were, like Dolphin and San Juan, NVOCC consolidating companies engaged in off pier stripping and stuffing of containers. The Board stated that in *Conex*:

> We held that the Rules were not valid work preservation clauses and that traditionally the off pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which require that the shipping companies stop doing business with consolidators did not have a lawful work preservation object. . . . No legal distinction can be drawn between Conex and this case and the few factual differences are without legal significance. *Supra,* note 6, Mem. Op. p.5.

Moreover, the decision of the Board in the instant case specifically referred to the comprehensive discussion of containerization, consolidation, NYSA and ILA bargaining history and the resulting Rules on Containers detailed in the Board's *Conex* decision. The court below does not attempt to distinguish *Conex* but simply reaches a conclusion contrary to the Board and the Second Circuit. In these circumstances, it is instructive to review the description in *Conex* of the off pier work traditions which are directly applicable to the instant case.

The labor jurisdiction of longshoremen has historically been defined in terms of location—namely, the docks. Longshoremen's work involves principally the loading and unloading of ships and other incidental functions performed *at the docks.* By contrast, the history of consolidation and containerization of freight

has, from the beginning, involved a significant *off dock* work tradition by teamsters and other non-ILA labor.[7]

From the earliest years of consolidation, the truckmen rather than the longshoremen were primarily responsible for sorting and consolidating maritime cargo. For example, truckmen would collect shipments for particular ports and deliver them to the appropriate pier.[8] As soon as boxes or containers were introduced, consolidators with non-ILA labor performed off-pier stuffing and stripping without ILA interference. In the mid-1950's, new types of vessels, specifically designed to carry large containers, were introduced by maritime common carriers. As much as 20 to 40 feet long, these containers were, in effect, over-the-road truck trailers. They could be placed directly on tractor and chassis rigs as an actual part of the truck, driven on and off the docks, and delivered to inland consignees with no further handling. Thus, the cargo which the new container vessels carried, the entity upon which the carrier's cargo rates were based, was the container itself.[9]

In the earliest stages of containerization, Respondent NYSA recognized the tradition of consolidating containers off the docks. Indeed, tariffs filed with the

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[7] *Balicer* v. *ILA*, 364 F. Supp. 205, 208 (D.C.N.J. 1973); *ILA and Consolidated Express*, 221 NLRB 956, 959, 960 (1975); *ILA* v. *NLRB*, 537 F.2d 706, 712 (2d Cir. 1976), *cert. den.* 429 U.S. 1041, *rehear. den.* 430 U.S. 911 (1977); *Balicer* v. *ILA*, 86 LRRM 2559, 2561, 2562 (D.C.N.J. 1974).

[8] *See* Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders, 6 FMC 327, 334-35 (1961).

[9] *See* from public records of FMC Pan Atlantic's July 16, 1958 tariff attached as Addendum A.

Federal Maritime Commission by NYSA members show that consolidation off pier was *mandatory* in order to qualify for the tariff rate under which consolidated containers have been and are shipped—namely, Freight-All-Kinds.[10]

In short, as the history in the *Conex* case establishes, off-pier consolidation of freight is, and always has been, the business of NVOCCs. The consolidation of shipments off pier by non-ILA labor has a history long antedating the recent era of containerization. Moreover, from the very advent of containers, which today are essentially the trailers or vans of trucks, off pier consolidators have been and continue to be involved in the work of consolidating, stuffing and stripping. It is not until recently that Respondents by agreement and enforcement of the Rules on Containers sought to acquire this work from the off pier consolidators. In light of this history, it is beyond question that the practices of Respondents were tactically calculated to benefit the ILA generally and sought to acquire work that had not been traditionally the work of the ILA.

ANALYSIS OF THE WORK IN CONTROVERSY BY THE COURT BELOW

The court below claims that the Board erred in defining the "work in controversy" and attributes to the Board the following error:

> Rather than define a category of work based on work patterns both prior and subsequent to the

[10] *See* Note 9 above. Especially notes 1, 5 and 9 of Pan Atlantic's tariff. The limitation on liability established under Note 9 was acceptable to the shipper-consolidator because the containers were sealed and not subject to rehandling, loss, or pilferage.

> innovation, the Board has defined the work in controversy specifically in terms of the innovation. Thus, by definition, removing any opportunity for pre-innovation workers to preserve their work. (p. 40, D.C. Circuit Opinion.)

The court's criticism is without justification. In this case, *Conex,* and other decisions, the Board fully explored the respective work traditions both on and off the pier prior to and after the innovation of containerization. Indeed, in examining the work patterns both prior to and subsequent to containerization, the Board in *Conex* stated that

> ". . . for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. *With the advent of vessels designed exclusively* to carry the large containers presently in use, these consolidating companies such as Consolidated and Twin, have *continued* to consolidate shipments into containers prior to their placement aboard the vessels." (*Conex, supra,* 221 NLRB 956, 959-960) (Emphasis added).

Containerization is the use of large "boxes" or trailers or containers, currently 20′, 35′ and 40′ long, to transport cargo from door to door (without rehandling of the cargo within the container). Historically, the filling or stuffing of these containers occurred both *on pier and off pier.* When *on pier* such stuffing of boxes or containers is done by ILA labor; however, when *off pier,* it is done at warehouses of truckers, NVOCC-consolidators, and other shippers by non-ILA labor. (*Conex, supra,* 221 NLRB 956, 959-960; 537 F.2d at 712).

Prior to modern day containerization, there was no 50 mile geographical demarcation for ILA jurisdiction. The only line drawn was on pier and off pier. All cargo coming *on the pier,* whether crated or loose, was loaded aboard the vessel by ILA labor. If loose cargo needed to be boxed or stuffed into a container, *on pier,* ILA labor did the work. If the cargo arrived from *any* distance from the pier already boxed or containerized, the cargo was loaded aboard the vessel in its boxed or containerized form—the boxing or containerizing of cargo *off pier* was not ILA's work.[11]

No evidence has been presented or suggested that, prior to containerization (the "innovation"), the ILA boxed or crated or consolidated *all* shipments within the 50 mile radius. On the contrary, as the Board found, off pier consolidators had a history of sorting and consolidating maritime cargo off the docks by companies employing non-ILA labor, whether into 8 foot or 16 foot or smaller boxes or containers, prior to the innovation. With the advent of containerization these consolidating companies have *continued* to consolidate shipments into the large 20′ and 40′ present day containers and trailers which in the container revolution are hoisted directly on new specialized container ships.

[11] In the earliest beginnings of the innovation of containerization, the ILA explicitly recognized non-ILA labor jurisdiction over off-pier trailer containers when in 1955, Thomas W. Gleason, current President of the ILA, stated, referring to the impending construction of the new specialized container vessels and the use of "over-the-road bodies" to be loaded directly on board the "new steamers", that "The International Longshoremen are not interested too much in that because that belongs to the International Brotherhood of Teamsters." Hearings on H.R. 5734 before the House Committee on Merchant Marine and Fisheries, 84th Congress, 1st Session, p. 835.

The Board recognized and considered this independent work tradition of off pier consolidators. It is the court below, and not the Board, that failed properly to define and evaluate the work in containerization.

RIGHT OF CONTROL ISSUE

The court below also sought to apply the right of control test for delineating primary activity as established in *NLRB* v. *Enterprise Association of Pipefitters,* 429 U.S. 507 (1977). The court concluded that control over the containers by the ocean carriers established beyond question the control necessary to meet the *Pipefitters* test. The Court's analysis is erroneous in a number of respects. First of all, the right of control should focus on the shipper or customer. It is the shipper who is to decide whether the goods should be handled by a consolidator or go directly to the pier. The ocean carrier has no control over that decision. More importantly, the court erred in its assumed but unproven fact that the ocean liners so control the containers that they may refuse to provide containers to consolidators. The law does not provide ocean carriers such discretion.

In fact, ocean carriers have *no discretion* as to treating all shippers equally and without discrimination (Sections 14 and 16 of Shipping Act.) (46 USC 813 and 815) The NVOCC is a shipper *vis-a-vis* the underlying ocean carrier.[12] Thus ocean common car-

[12] Consolidators utilizing transportation equipment of underlying common carriers have long been treated as shippers *vis-a-vis* the underlying carriers. *See Acme Fast Freight Inc. Common Carrier Appl.,* 17 MCC 549, 555 (1939) and the several Supreme Court cases cited therein. See also *Sea Land Services et al., Pro-*

riers who furnish containers to shipper customers, must furnish such containers and the services of containerized movement to *all* shippers, including NVOCC consolidators, equally and without discrimination.

> It is elemental and basic to the United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services. *Sea-Land Services, Inc. and GPRL—Proposed Rules on Containers, etc., supra.* Note 12.

The history of the law in this area of common carrier obligations goes back to the earliest development of Anglo-Saxon law, many cases describing the duties as almost absolute and some cases even holding that the carrier must run the risk of incurring a strike rather than refuse to serve a blacklisted shipper. See e.g., *Possible Violations of Shipping Act,* 16 SRR 425, 438-439 (1975) and cases discussed therein. In fact, the ocean carriers do not have the legal authority to blacklist or boycott consolidators from receiving containers. Carriers cannot discriminate because the shipper is competing with the carrier or because of who really owns the goods or for other similar reasons.[13]

Thus, since the ocean carriers, here the contract employers of ILA labor, cannot (1) refuse to furnish

posed Rules on Containers, 18 SRR 553 (FMC 1978) adopting I.D. 16 SRR 315 (1975). This case is presently on appeal in the D.C. Circuit—*Conasa and NYSA* v. *FMC,* No. 78-1776.

[13] See *American Trucking* v. *Atchison, T.&S.F.R.R. Co.,* 387 U.S. 397, 408 (1966); *ICC* v. *Delaware L.&W.R.R.,* 220 U.S. 233, 252 (1911). Nor can carriers treat shippers differently because of circumstances arising before the service of the carrier begins or after it was terminated. *ICC* v. *Delaware,* above.

containers to all shippers alike, including NVOCC-consolidators; (2) cannot assign the work of stuffing the containers to ILA labor; (3) cannot control the labor employed by the shippers; or (4) control where the containers are stuffed, there is therefore a complete absence of the right to control the work sought by Respondent ILA here. *Pipefitters* mandates that the decision of the court below be reversed.

PROPER STANDARD OF REVIEW

As discussed above, the Court of Appeals, D.C., misapplied the principles of *National Woodworkers* and *Pipefitters.* Moreover, the Court "failed to adhere to the statutory standard under which [it] was obliged to review this case," *Pipefitters* at 531, which reversed the same Court of Appeals here for similar judicial overreaching.[14] In *Pipefitters,* the Supreme Court said

> the Board's reading and application of the statute involved in this case [§ 8(b)(4) of Labor-Management Relations Act], however, are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers, *Pipefitters* at 528.

Continuing, the Supreme Court said

> The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board's findings were supported by substan-

[14] *See also NLRB* v. *Weingarten,* 420 U.S. 251; *NLRB* v. *Ironworkers,* 434 U.S. 335; and *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483.

tial evidence on the record considered as a whole. . . .'' It appears to us that in reweighing the facts and setting aside the Board's order, the Court of Appeals improperly substituted its own view of the facts for those of the Board. *Pipefitters, supra,* at 531, 532.

The record amply supports the Board's conclusions that the Rules on Containers were not valid work-preservation clauses and that the purpose of the Rules was to force or require employer members of NYSA to cease or refrain from handling, transporting or selling cargo space to consolidators who refused to use ILA labor to perform consolidation. The Court of Appeals failed to apply the statutory standard of review and improperly substituted its own view of the facts for those of the Board.

CONCLUSION

For all of the above reasons the judgment of the Court of Appeals should be reversed and the decision and order of the NLRB should be enforced.

Respectfully submitted,

RAYMOND P. DE MEMBER
Attorney for International Association of NVOCCS
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

APPENDIX

APPENDIX

OFFICIAL FILE
PAN-ATLANTIC STEAMSHIP CORPORATION

OUTWARD
FREIGHT TARIFF No. 2

Original Page No. 119
FMB-F No. 3

SECTION 3 COMMODITY RATES (Continued)

FREIGHT, ALL KINDS (Except as noted), in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailers by consignee, moving under a shipper's load and count bill of lading, subject to Notes 1, 2, 3, 4, 5, 6, 7, 8 and 9,

	In Cents Each
per trailer	80,000

Note 1: Freight must consist only of consolidated less than truck-load shipments, each of which individually weighs 15,000 pounds or less.

Note 2: Household goods, office furniture and fixtures, or personal effects included in a shipment, shall not exceed 10 per cent of the total weight or total cubic measurement (whichever is smaller) of the entire shipment.

Note 3: No freight may be included in shipments which is prohibited by law, or by the provisions of this tariff or Tariff FMB-F No. 4.

Note 4: Maximum weight loaded in any one trailer shall be 44,000 pounds.

Note 5: Subject to prior arrangements with the carrier, the following provisions will apply:

At Origin: Trailers shall be removed from the terminal of the carrier at Port Nework, N.J. by

the shipper for loading at shipper's expense and risk. Shipper shall assume full responsibility for the safety of trailers and chassis while in his possession, and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

At Destination: Trailers shall be removed from the terminal of the carrier at San Juan, P.R., Ponce, P.R., or Mayaguez, P.R. (as billed) by the consignee for unloading at consignee's expense and risk. Consignee shall assume full responsibility for the safety of trailers and chassis while in his possession and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

Each trailer removed from carrier's terminal will be furnished with chassis without additional charge by the carrier, but shipper and consignee shall furnish his own tractor.

Note 6: The per trailer charge will be made for each trailer removed from the carrier's terminal for loading, except that where more than one trailer is used, overflow freight loaded in the last trailer will be charged for at the rate applicable to the actual weight or measurement thereof (whichever is higher) subject to a maximum of 80000 cents for the last trailer. Shipper shall furnish weights and measurements on all packages loaded in the last vehicle otherwise the regular per trailer charge shall apply.

Note 7: Not applicable on refrigerated cargo or on cargo requiring controlled temperatures.

Note 8: Upon request, shipper shall furnish to carrier a manifest for each trailer loaded which shall show by individual shipments the commodity, the number of packages and the weights and dimensions of each such package.

Note 9: The carrier's liability will be limited to $500.00 per trailer where the per trailer charge is assessed. Bill of Lading will bear notation reading:

"Shipper hereby agrees that carrier's liability is limited to $500.00 with respect to the entire contents of each trailer, except when shipper declares a higher valuation and shall have paid additional freight on such declared valuation as provided in Item 1 of General Rules and Regulations."

ISSUED: July 16, 1958 EFFECTIVE: July 21, 1958

Issued by W. C. Farnell Jr., Traffic Manager
Foot of Doremus Avenue
Port Newark, N.J.